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IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 135

SIMEON HALLOWELL,
Appellant,

vs.

JOHN M. COMMONS, AS ACTING INDIAN AGENT AND SUPERVISOR AND SPECIAL DISBURSING AGENT FOR THE OMAHA TRIBE OF INDIANS OF NEBRASKA, AND SARAH H. WALKER,
Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLANT.

HIRAM CHASE,
WILLIAM ROSS KING,
Solicitors for Appellant.

ELBOD BROS., OMAHA.

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JOHN M. COMMONS, AS ACTING INDIAN AGENT AND SUPERVISOR AND SPECIAL DISBURSING AGENT FOR THE OMAHA TRIBE OF INDIANS OF NEBRASKA, AND SARAH H. WALKER,
Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

Simeon Hallowell brought this action April 19, 1909, in the Circuit Court of the United States, District of Nebraska, to quiet title to 80 acres of land on the Omaha Indian Reservation in Thurston County, Nebraska.

In 1884, Jacob Hallowell, a member of the Omaha tribe of Indians, was allotted the land in dispute under the provisions of an act of Congress, passed Aug. 2nd, 1881, (22 Stats. 341). Section 6 of this act is as follows:

> "That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, or in case of his decease, of his *heirs according to the laws of the State of Nebraska,* and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void; Provided, that, the law of descent and partition in force in the said state shall apply thereto after patents therefor have been executed and delivered."

Jacob Hallowell left surviving him as heirs to his allotment a half sister, Margretae Clay, and two children of a deceased brother, Benjamin Hallowell. The sister died in 1906, having no living heirs except a grandson, Hiram Chase and a great-granddaughter, Eileen Lawless. Hiram Chase is not made a party defendant and makes no claim adverse to the com-

plainant, but brings this suit as his solicitor. Eileen Lawless was not made a party because beyond the jurisdiction and processes of the court. The complainant is the son of Benjamin Hallowell. Defendant, Sarah Hallowell Walker, is the half sister of complainant, being the issue of a second plural and polygamous marriage of Benjamin Hallowell.

Complainant avers in his bill of complaint that the defendant, Sarah Hallowell Walker, claims a one-fourth interest in said land and that defendant, John M. Commons, Indian Agent, has been disbursing the rents from said premises, giving the said defendant, Sarah Hallowell Walker, one-fourth of said rents. Complainant further avers that defendant, Sarah Hallowell Walker, is an illegitimate child of the said Benjamin Hallowell and not entitled to share with complainant the one-half interest in the land allotted to Jacob Hallowell, which should descend to the lawful heirs of his brother, Benjamin Hallowell according to the laws of the State of Nebraska. Further that upon the death of Margretae Clay, appellant succeeded by right of survivorship to sole ownership in the allotment (Trans. pp. 1-7). Ageneral demurrer was filed to the bill.

The memorandum opinion filed in the then District Court (Trans. p. 8(indicates that the bill was dismissed upon the ground that the polygamous marriage of Benjamin Hallowell having been celebrated prior to the allotment act of 1882, it should be considered as valid and Sarah Hallowell Walker as a legitimate child, en-

titled to share in the inheritance of the allotment. It was also held that the estate should descend as an inheritable estate and the claim of appellant to sole ownership was regarded as unfounded.

Complainant appealed to the Circuit Court of Appeals. There the judgment of the District Court was affirmed, but upon the ground that the District Court and Circuit Court of Appeals were deprived of jurisdiction by reason of the passage of an act of Congress of June 25, 1910, which was construed as giving the Secretary of the Interior exclusive jurisdiction to determine the heirs of an Indian allottee dying before the expiration of the period during which the land was to be held in trust (Trans. pp. 17-20).

The Circuit Court of Appeals in its opinion delivered by Circuit Judge Walter I. Smith, of the Eighth Circuit also expressed the opinion that the District Court properly dismissed the complainant's bill upon the merits. That although the issue of a polygamous marriage, Sarah Hallowell Walker was entitled to inherit equally with complainant, her half brother, because the marriage being valid when made and in accordance with the Indian custom should be considered as valid for the purpose of determining the descent of these allotted lands (Trans. pp. 22-23). This Court also refused to recognize appellant's claim to sole ownership (Trans. p. 18).

Complainant now appeals to this court from the judgment of the Circuit Court of Appeals and assigns the following errors:

ASSIGNMENT OF ERRORS.

1—The Circuit Court of Appeals erred in holding that teh District Court and Circuit Court of Appeals lost jurisdiction of this case by reason of the passage of the Act of Congress of June 25, 1910, (36 Stats. 855). Although the said Act of 1910 repealed so much of the acts of 1894 and 1901, giving the Federal Courts jurisdiction over Indian claims, as conflicts therewith, the repealing act should not be applied to the case at bar which was pending at the time of its passage.

2—The District Court and Circuit Court of Appeals erred in holding that the defendant, Sarah Hallowell Walker, the issue of a polygamous Indian marriage, should share in the inheritance of the allotment as an heir of the allottee, Jacob Hallowell. The allotment statute specifically provided that the allotment should descend "According to the laws of the State of Nebraska."

3—The District Court and Circuit Court of Appeals erred in holding that a polygamous marriage should be regarded as valid in determining the descent of lands allotted to a member of the Omaha tribe of Indians.

4—The District Court and Circuit Court of Appeals erred in holding that the heirs of Jacob Hallowell, the allottee, take the land by descent and not as purchasers or donees. Appellant's contention is that upon the death of Margretae Clay, who was theretofore ap-

pellant's joint tenant, he became sole owner of the entire allotment of eighty acres. That the allotment was a gift to a class determinable at the expiration of the trust period.

BRIEF OF THE ARGUMENT.

CHAPTER I.

JURISDICTION.

Appellant filed his bill in equity on the 19th day of April, 1909, (Trans. p. 1) in the Circuit Court of the United States for the District of Nebraska. At that time the following act of Congress passed in 1894, and amended in 1901, (hereinafter spoken of as the "Act of 1894") was in force relating to the jurisdiction of Circuit Courts:

> "That all persons who are in whole or in part of Indian blood or descent, who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment act or under any grant made by Congress, or who claim to have been lawfully denied or excluded from any allotment or parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress, may commence and prosecute or defend any action, suit or proceeding in relation to their right thereto, in the proper Circuit Court of the United States; and said Circuit Courts are hereby given jurisdiction to try or determine any action, suit or proceeding arising within their jurisdiction involving the right of any person in whole or in part of Indian blood or de-

> scent to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect when properly certified to the Secretary of the Interior as if such allotment had been allowed and approved by him, but this provision shall not apply to any land now held by any of the five civilized tribes nor to any land within the Quapaw Indian reservation: Provided, that the right of appeal shall be allowed to either party as in other cases." Act Feb. 6, 1901, C. 217, Sec. 1, 31 Stat. 760, amending Act Aug. 15, 1894, C. 290, 28 Stat. 305.

On June 25, 1910, Congress passed a law (hereinafter referred to as the "Act of 1910"), which provided:

> "That when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive." (36 Stat. 855.)

The judgment in the District Court was upon the merits of the plaintiff's bill. This judgment was affirmed by the Circuit Court of Appeals, upon the ground, however, that the Circuit Court was without jurisdiction. The opinion of the Circuit Court of Appeals is summarized as follows:

"Under this statute or the amendatory act of February 6, 1901, (31 Stats. 760), the complainant might have claimed, to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress, but for the enactment of 36 Stats. 855, which took the jurisdiction away from the court which had existed since August 15, 1894, and vested it exclusively in the Secretary of the Interior. This act of June 25, 1910, was, therefore, as applied to its subject matter of lands the legal title to which was in the Government, valid and repealed so much of the acts of 1894 and 1901, as conflicted therewith" (Trans. p. 21).

Appellant's contention is that the Act of 1910, did not repeal the Act of 1894, as to this action which was then pending; that the Act of 1910 must be construed prospectively as to pending actions, because the repeal did not result in a mere change of procedure, but deprived the plaintiff of a substantial right.

Before the passage of title out of the United States the decision of officers of the Land Department on matters relating to the public lands other than Indian lands, is conclusive; but after title has passed, even though the language of the act from which the executive department derives its authority is that its decisions shall be "final and conclusive," nevertheless in case of fraud, mistake or error of law, courts of equity have jurisdiction to review the decision of the Land Department. As said by Mason, C. J., in Johnson vs. Towsley, 1 Neb. 75, 13 Wallace 72, "They (referring to executive officers) are good material for juries. They are not fit for judges."

The difficulty of applying this well recognized general rule to lands allotted to the Indians in severalty and held in trust by the government, thereby giving the Indian a right, if aggrieved by the decision of the Interior Department, to be heard before a judicial tribunal, was that although the *equitable* title to these lands passed to the individual Indian, the government retained *legal* title, and was therefore a necessary party to a suit to adjudicate the title, and its consent was necessary in order to make it a party. Moreover, the federal government has at all times maintained the attitude of guardian of Indian affairs generally, so that to apply the common law rule was subject to the objection of being an unwarranted interference by the courts with an executive department.

Prior to the Act of 1894, above referred to, disputes between individuals over Indian allotments were cognizable only by the Secretary of the Interior.

> "The Commissioner of Indian affairs shall, under the direction of the Secretary of the Interior and agreeable to such regulations as the President shall prescribe, have the management of all Indian affairs and of matters arising out of Indian relations. Revised Stats. Title XI, Chap. 4, Sec. 463, 4 Stats. 564. 15 Stats. 228, 18 Stats. 450. *Hy-Yu-Tse-Mil-Kin vs. Smith,* 194 U. S. 401."

The Act of 1894, quoted supra, giving Federal Courts original jurisdiction over the claims of individual Indians to allotments, gave the Indian the same rights to be heard in a court of law as theretofore had by other claimants to public lands. Indeed, Congress con-

sented to submit the rights of the government to the then Circuit Courts, there to review decisions of the Department of the Interior upon questions of law *or primarily to determine* all claims to allotments. Jurisdiction therefore even broader than that allowed by the principle of equity announced in Johnson vs. Towsley, was given the Federal Circuit Court by the Act of 1894. Sloan vs. United States, 59 Fed. 13; McKay vs. Kalyton, 204 U. S. 453.

The Act of 1894 did not deal solely with procedure for the enforcement of Indian claims to allotments. Theretofore, the claim of an Indian to an allotment was finally determined by an executive officer. If the decision of that officer was adverse he had no right of appeal and because of the fact that the legal title to the land was still in the government, he had no right to have his claim to an equitable interest in the land adjudicated by a court of law. Moreover, by virtue of the act the United States consented to be made a party defendant. The repealing act of 1910, by which the Indian was again compelled to submit his claim to an allotment to the Secretary of the Interior until after final patent had issued and legal title passed out of the government, therefore deprived the Indian of a substantial right and comes within the rule that statutes affecting substantial rights should be construed prospectively and not to apply to pending cases.

An analagous class of cases, where the repeal or amendment of a statute conferring a right has been held not applicable to pending cases.

A similar construction has been put upon an amendatory act confining to the Circuit Court of the district where the contract was to be performed actions on bonds given by contractors engaged in the construction of public works. The federal statute which created the right to make the United States a party plaintiff in suits on such bonds, was passed for the benefit of material men and persons furnishing labor to take the place of the ordinary mechanic's or material man's lien. United States vs. National Security Company, 92 Fed. 549.

In *U. S. Fidelity & Guaranty Co. vs. United States, for the use and benefit of Struthers-Wells Co.*, 209 U. S. 306, this court had under consideration a case where suit on such a bond was brought in another district than that in which the contract was to be performed. The action had been started before the amendment above referred to went in force. Speaking of the limitation created by the amendment as to the district in which the suit could be brought, this court said, p. 316:

> "The various provisions are all contained in the same section of the statute, and there is not much of it left to be made retrospective, as matter of procedure, after these other provisions have been held to be prospective only. If the limitation as to the district in which the suit upon the bond could be brought were to be regarded as simply matter of procedure (which we do not assert), we still think it is not to be construed as applying retrospectively."

As in the case at bar the original statute consented to make the United States a party to the suit, thereby conferring a substantial right. When, thereafter, a statute is passed lessening, or as in the case at bar, entirely depriving the plaintiff of that right and the courts of all jurisdiction over a case pending under the statute, such amendatory act should not apply to pending cases.

U. S. Fidelity & Guaranty Co. vs. United States, for the benefit of Kenyon, 204 U. S. 349, was a very similar case to the case last above cited. Speaking of the question of the amount necessary to confer jurisdiction, this court said, p. 359:

> "As the act of 1905 does not refer to cases pending at its passage, the question of jurisdiction depends upon the law as it was when the jurisdiction of the Circuit Court was invoked in this action."

Burton et al vs. Seyfert Plastic Relief Co., 61 S. E. 933, is another case where the effect of the amendment in confining jurisdiction of such actions to the Federal Circuit Court was under consideration. There the Supreme Court of Appeals of Virginia, referring to the amendatory act, said:

> "When the statute of February 14, 1905, was passed which it is claimed operated as a repeal of the former statute under which this suit was brought, Seyfert & Company had utilized the consent given in the former statute to sue in the name of the United States by the institution of this law suit."

Whether the consent of the United States is to be made a party plaintiff or defendant, as under the Act of 1894, such consent confers a valuable and substantive right. The mere fact that the statute at the same time confers jurisdiction of the suit authorized upon certain courts does not indicate that the statute is merely procedural in its nature. When such a statute is amended or repealed, actions authorized by it and pending at the time of the amendment or repeal should be finally adjudicated.

The repealing act of 1910 is supplied with a saving clause as to pending cases by the federal statutory construction act. (Revised Stats. Sec. 13.)

At common law, all actions were terminated with the repeal of the statute under which they existed. The evil effect of this rule, both with respect to criminal and civil actions pending at the time of amendment, has been recognized by numerous statutes and by the trend of decisions, which in every way seek to avoid the consequences of the common law rule. In *Eastman vs. Clackamus County,* 32 Fed. p. 33, exception was taken to the common law rule in the following language:

> "It is an arbitrary one and never had anything to commend it except in the United States an undue sympathy for wrong doers and in England an early prejudice among common law judges against statute made law. * * * A more liberal policy was recognized by the Federal government by the Act of February 25, 1871, (now in Rev. Stats. Sec. 13) where it was declared that, '*the repeal of any statute shall not have the effect to release or extinguish*

any penalty, forfeiture or liability incurred under such statute unless the repealing act shall so expressly provide." Cited with approval in Jacobus vs. United States, 96 Fed. 260.

This court in the case of *Hertz, Collector vs. Woodman*, 218 U. S. 216, construed the word "liability" in the Act of 1871, referred to in the case last above cited, as including an application to compel payment of a tax imposed under a repealed statute. To quote from the opinion of Justice Lurton:

"There are cases which go so far as to say that the unqualified repeal of a law as effectually destroys rights and liabilities dependent upon it, not past and concluded, as if the statute had never existed. It is, however, putting it strongly enough to say, that an unqaulified repeal operates to destroy inchoate rights, as a release of imperfect obligations and as a remission of penalties and forfeitures dependent upon the destroyed statute. United States vs. Reisinger, 128 U. S. 398; Curtis vs. Lovett, 15 N. Y. 9, 152 et seq.; Town of Belvidere vs. Warner R. R. Co., 34 N. J. L. 193; 1 Lewis Sutherland Stat. Const. Sec. 282 et seq.

"There has been a marked legislative trend in the direction of escaping from serious consequences sometimes incident to this common law rule of construction, indicated by general statutes saving *liabilities, penalties* and *forfeitures* incurred under repealed statutes. Such a general statute was passed by Congress on February 25, 1871, Ch. 71, 16 Stat. 431, the fourth section of which was carried into the revision of 1878 and is now in force as Sec. 13, Rev. Stat. * * * This provision has been upheld by this court as a rule of construction applicable, when not otherwise provided, *as a gen-*

eral saving clause to be read and construed as a part of *all subsequent repealing statutes*, in order to give effect to the will and intent of Congress.

"This section is not alone applicable to penalties and forfeitures under penal statutes. It extends as well to 'liabilities,' and a liability or obligation to pay a tax imposed under a repealed statute is not only within the letter, but the spirit and purpose of the provision."

In *Burton et al vs. Seyfert Plastic Relief Co.*, 61 S. E. 932, cited supra, a civil liability was regarded by the Supreme Court of Appeals of Viriginia as persisting as to cases pending at the time of amendment or repeal. After referring to the general tendency against retroactive construction the court quoted the act of 1871, Revised Stat. Sec. 13. The court in this case was dealing with the question of repeal of an act of Congress and its effect upon pending cases.

In the case at bar the right of an Indian under the act of 1894, to make the United States a party defendant to a suit to quiet title to an allotment held in trust by the government and to have his rights adjudicated in a court of law comes as clearly within this act as the "liability" referred to in the opinion of this court in the Hertz case. The Act of 1894, is, therefore supplied with an express saving clause by Rev. Stat. Sec. 13.

Illinois has a statute the language of which is somewhat similar to Rev. Stat., Sec. 13. Section 4 of the Illinois act, is as follows:

> "No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not as to any offense committed against the former law, or as to *any act done, any penalty, forfeiture or punishment incurred or any right accrued, or claim arising under the former law,* or in any way whatever to affect any such offense or act so committed or done or any penalty, forfeiture or punishment so incurred or *any right accrued or claim arising* before the new law takes effect." Chap. 131. Hurd's Statute, Sec. 4.

In the case of *Merlo vs. Coal Mining Co.,* 258 Ill. 328, the Supreme Court of Illinois held that an action to recover for a tort involving an alleged violation of a mining law was not affected by a subsequent repeal if suit was brought before the repeal took affect.

The court in that case referred to the statute as "a general saving statute." The opinion refers among other cases to an action in tort resulting from intoxication; also to an action for personal injuries resulting from a defective highway.

Consolidated Barb Wire Company vs. Stevenson, 71 Kan. 64. The language of the Kansas statute is as follows:

> "The repeal of a statute does not revive a statute previously repealed, nor does such repeal affect *any right which has accrued, any duty imposed, any penalty incurred, nor any proceeding commenced* under or by virtue of the statute repealed."

This was an action for the appointment of a receiver. The point was made that the law under which

the plaintiff was proceeding was repealed while the action was pending. It was held, however, that the general statute above referred to, had the effect of preserving the plaintiff's right to a receiver under the law before it was repealed.

Wells, Administrator vs. Town of Remington, 118 Wis. 573. This was an action by an administrator for the death of a minor alleged to have been caused by a defective highway. After suit brought a statute was passed providing that no action should be maintained by a parent on account of injuries received by a minor child. It was held that the general statutes made the amendatory act prospective. The statute referred to was as follows:

> "The repeal of a statute shall not remit, defeat or impair *any right of action accrued under such statute before the repeal* thereof, whether or not in course of prosecution or action at the time of such repeal."

This court in *Murphy vs. Utter*, 186 U. S. 95, was dealing with the statutory construction act of the State of Arizona which provides as follows:

> "The appeal or abrogation of any statute, law or rule does not revive any former statute, law or rule theretofore appealed or abrogated, nor does it affect *any right then already existing or accrued at the time of such repeal, or any action or proceeding* theretofore taken."

This was an action of mandamus to compel the issuance and delivery of refunding bonds of the territory pursuant to certain acts of Congress. No judg-

ment had been obtained upon the bond and it was held that the right of action persisted, notwithstanding the repealing act passed after the action brought, because it came within the term " proceeding theretofore taken."

Hochstetler vs. Morier Coal & Mining Co., 35 N. E. 927. The statutory construction act of Indiana considered in this case contained the following language:

> "The repeal of any statute shall not have the effect to release or extinguish *any penalty, forfeiture, or liability* incurred under such statute unless the repealing act shall so expressly provide." Revised Stats. 1881, Sec. 248.

This was an action in tort for damages sustained from the caving in of the roof of a coal mine. The plaintiff proceeded upon the theory that the defendant was negligent in failing to comply with certain provisions of the mining law with reference to suitable timbers and props to secure the workings from falling. No special right of action was conferred by this statute, but it made the failure to supply the appliances in question negligence per se. While the action was pending the mining act in question was repealed. It was held that the act as it originally stood should apply to the pending case by reason of the general statutory saving clause or statutory construction act, quoted supra. The liability in this case was practically a civil liability. The statute imposed no penalty. It was in fact a mere change in a rule of evidence. Yet it was held to come within the terms of a statute, the language of which is identical with Section 13 of the federal act,

applicable to the acts of Congress involved in the case at bar.

The interpretation of the state statutes in the foregoing cases is in harmony with the construction put upon the federal statutory construction act in the case of *Hertz, Collector, v. Woodman,* supra. The general saving clause put in the statutory construction acts both state and federal and the numerous decisions construing these acts as including actions of every nature, indicate a trend both legislative and judicial away from the common law rule that the repeal of a statute does away with all actions pending thereunder.

Cases cited in the opinion of the Circuit Court of Appeals as sustaining its holding that the District Court and appellate courts have no jurisdiction of this action.

Three cases were cited by Circuit Judge Smith in the opinion of the Circuit Court of Appeals in support of the proposition that the act of June 25, 1910, repealed so much of the acts of 1894 and 1901, amendatory thereof as conflicted therewith. In all of these cases the suits were pending at the time of the passage of the act of 1910.

Bond vs. United States, 181 Federal, 613. After a consideration of the question of whether or not the act of 1910 had the effect of repealing the act of 1894, the Circuit Court for the District of Oregon, disposed of the fact that the case was pending when the repealing act was passed by the mere statement that as there was no saving clause the authority of the court immediately ceased over pending cases.

Pel-Alta-Yacot vs. United States, 188 Fed. 387, is the second case cited. Here the Circuit Court for the District of Idaho followed the *Bond case* (supra) and cited in addition the case of Railroad Company vs. Grant, 98 United States, 398, hereafter more particularly referred to.

Parr vs. Colfax, 197 Fed. 302, Circuit Court of Appeals, Ninth Circuit, is the third case cited in the opinion of the Circuit Court of Appeals. The opinion in this case appears to have been based upon the case of United States vs. Kelly, 97 Fed. 450, by the same court, which in turn was based upon the following authorities:

United States vs. McCrory, 91 Fed. 295.
Fairchild vs. United States, 91 Fed. 297.
Railroad Company vs. Grant, 98 U. S. 298.
Sherman vs. Grinnell, 123 U. S. 679.
In re Hall, 167 U. S. 38.

The first two cases last referred to are based upon the decisions of this court in In re Hall. *In that case this court had under consideration a repealing statute which expreslly provided that all pending actions should be vacated.* Soon after the McCrory and Fairchild cases, supra, were decided the Circuit Court of the District of Connecticut recognized the error of following In re Hall, where there is no provision in the repealing statute that pending actions should be vacated. In *Strong vs. U. S.,* 93 Fed. 257, that court said:

"The repealing act referred to in In re Hall, specifically provided that all proceedings shall be

vacated and no judgment heretofore rendered in in pursuance of said act shall be paid. (29 Stats. 669.)"

Railroad Company vs. Grant, supra, dealt solely with an act conferring upon certain courts jurisdiction where the amount in controversy exceeded a certain sum. The opinion in that case went upon the ground that the law was one relating solely to jurisdiction.

Sherman vs. Grinnell, dealt with the repeal of a practice act. It merely affected procedures and did not deprive the plaintiff in the pending suit of any vested or substantial right.

In not a single one of the original authorities supra, was the court considering the effect of a repealing statute affecting substantial rights except in the case of In re Hall, where the repealing act specifically terminated all pending actions. See also *District of Columbia vs. Eslin*, 183 U. S. 62.

Conclusion as to jurisdiction.

When the case at bar was decided by the District Court it was not upon the ground that the court had no jurisdiction. This plaintiff perfected his appeal to the Circuit Court of Appeals and there for the first time the question of jurisdiction was raised. It would have availed the plaintiff little after the passage of the act of 1910, to have dismissed this case and submitted his claim to the Department of the Interior whose subordinate officers had, as appears from the bill of com-

plaint, been for some time paying a portion of the rent from the premises to the defendant. The Department of the Interior had, in effect, already decided the plaintiff's case adversely to his contention. After the passage of the Act of 1910, he would have had no further right or remedy so far as the rent and profits from the land were concerned until after the issuance of a final patent or possibly the sale of the land to bona fide purchasers.

The Act of 1894 conferred on the plaintiff a substantial right. The Repealing Act of 1910, therefore, should not be construed retrospectively as applying to this case which was pending when the repealing act was passed. Moreover the Act of 1894, created a "liability" which comes with the general saving clause supplied by the federal statutory construction act. Finally, it is submitted that the opinion of the Circuit Court of Appeals on this branch of the case is based upon authorities distinguishable from the case at bar.

CHAPTER II.

BY THE EXPRESS TERMS OF THE ALLOTMENT ACT THE LAND IN CONTROVERSY WAS ALLOTTED TO JACOB HALLOWELL TO BE HELD BY THE UNITED STATES IN TRUST FOR A PERIOD OF TWENTY-FIVE YEARS FOR THE SOLE USE AND BENEFIT OF JACOB HALLOWELL OR IN CASE OF HIS DECEASE OF HIS HEIRS ACCORDING TO THE LAWS OF THE STATE OF NEBRASKA. THIS IMPOSED UPON THE ALLOTMENT THE LAWS OF NEBRASKA WHICH DO NOT PERMIT THE DEFENDANT, SARAH HALLOWELL WALKER, THE ISSUE OF A POLYGAMOUS MARRIAGE OF THE BROTHER OF THE ALLOTTEE, TO SHARE IN THE INHERITANCE.

When Jacob Hallowell, the original allottee to the land here in dispute, died, he left surviving him, Margretae Clay and appellant, Simeon Hallowell, children of a deceased brother, Benjamin Hallowell. Benjamin Hallowell, after the death of complainant's mother, married an Omaha Indian named Mary Tyndall. There were no children surviving as the result of this marriage. In 1875, while his wife, formerly Mary Tyndall, was still living and undivorced, he took a second plural and polygamous wife, Gradustawe Blackbird. The present suit is to adjudicate the claim to a one-fourth interest in the land made by Sarah Hallowell Walker, who was the issue of this polygamous marriage.

Sec. 6, 22 Stats. 341, the Allotment Act of 1882 under which the land in controversy was allotted, provides:

> "That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus

allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of *his heirs according to the laws of the State of Nebraska,* and that at the expiration of said period the United States will convey the same by patent to said Indian or his *heirs as aforesaid,* in fee discharged of said trust and free of all charge or incumbrance whatsoever."

The rule by which the descent to lands allotted under this Act of Congress was cast, is expressly and unconditionally set forth in the act itself. What may have been the purpose of imposing the laws of the State of Nebraska upon the descent of lands to be held by the individual members of a race not yet fully conforming to civilized laws and customs, but little affects the meaning of the statute. Unquestionably many of the laws seeking to make the Indian conform in all respects to the white man's law, have met with but imperfect enforcement.

But the statute in question does not affect marital relations entered into prior to its passage, nor does it affect the legitimacy of the issue of such marriages except in so far as relates to the inheritance of these lands allotted by the government to the Indians in severalty. A child may be illegitimate for cetrain purposes though legitimate in other respects. To this extent only the government applied the laws of the State regardless of when the marriage was consummated, and it may have been with the object in view of more effectively bringing the succeeding generation of Indians to recognize and conform to the laws of the state.

To construe the words "the laws of the State of Nebraska" as not meaning the laws relating to inheritance by illegitimate children, necessitates a construction of the language contradictory to its express terms and amounting to judicial legislation. Similar language in other allotment acts has been construed as in all respects abrogating the Indian law or custom and necessitating the application of the laws of the state to matters pertaining to inheritance of allotments.

Sizemore vs. Brady, 235 U. S. 441. In this recent decision this court held that paternal cousins should inherit an allotment, in accordance with the laws of the state where the land was located, in preference to maternal cousins, who by the Indian laws would have shared in the inheritance. It could have been argued in that case with as much force as the case at bar that to fail to recognize the Indian law would result in depriving certain Indians of land who by their own law expected to acquire an inheritance. Yet this consideration could not have weight with this court in determining what was "the law of the state where the land is located," as used in the allotment statute.

Parr vs. United States, 153 Fed. 462. Here the allotment act provided that upon the death of the allottee the right to title should descend to his heirs "*according to the laws of the State of Oregon.*" The particular point of law involved was as to the right of the husband of an allottee to curtesy. It was held that

the laws of the State of Oregon relating to curtesy should be applied to the determination of title to the allotment.

Beam vs. United States, 162 Fed. 260, is another case where the Circuit Court of Appeals, Ninth Circuit, held that the laws of the state governing curtesy should in accordance with the terms of the allotment act, govern the descent in preference to any law or custom that may have prevailed among the Indians concerning the descent of real estate.

CHAPTER III.

DEFENDANT, SARAH HALLOWELL WALKER, IS NOT AN HEIR OF JACOB HALLOWELL, THE ORIGINAL ALLOTTEE TO THE LAND HERE IN CONTROVERSY. SHE IS THE ISSUE OF A SECOND AND POLYGAMOUS MARRIAGE WHICH, THOUGH IT MAY HAVE BEEN LAWFUL BY THE CUSTOMS OF THE INDIANS, CANNOT BE RECOGNIZED IN A COURT OF LAW IN DETERMINING WHO ARE THE HEIRS OF JACOB HALLOWELL.

The Circuit Court of Appeals, though dismissing appellant's bill on the ground of jurisdiction, referred to three cases as supporting defendant's claim that she is entitled to share with the heirs of Jacob Hallowell.

In the first of these cases, Jones vs. Meehan, 175 U. S. 1, it does not appear that the question of whether or not a polygamous marriage would be recognized in determining heirship was raised.

The second case, Kobogum vs. Jackson Iron Company, 76 Mich. 498, 43 N. W. 602, appears to be the only adjudicated case where the issue of a polygamous marriage has been held to be legitimate by an American court. The case was decided upon what appellant deems an erroneous theory. The basis of the decision is sufficiently indicated from the following excerpt, pp. 507, 508:

> "While most civilized nations in our day very wisely discard polygamy, and it is not probably lawful anywhere among English speaking nations, yet *it is a recognized and valid institution among many nations, and in no way universally unlawful.* * * * It is a principle of universal law that marriages valid by the law governing both parties when made must be treated as valid everywhere."

Appellant's contention is that *polygamous* marriages are an exception to this rule. The Kobogum case was first considered by the Supreme Court of Michigan under the title Compo vs. Jackson Iron Co., 50 Mich. 578, 16 N. W. 295. The opinion of *Judge Cooley* is summarized in the following language in the head note:

> "Cohabitation of an Indian chief, who has a wife living, and another woman, followed by a voluntary separation of the parties to the alleged second marriage, and the forming of new relations with others by both parties, cannot, contrary to the recognized laws of all Christian nations, be upheld as a valid marriage according to Indian customs; and a child born as the fruit of the cohabitation with the second woman cannot be considered legitimate and entitled to inherit from her father as such."

This opinion was rendered June 13, 1883. Judge Campbell wrote a dissenting opinion based upon the proposition that marriages which are valid where made are valid everywhere. No authorities were cited except in support of this general proposition. When the case again came before the Supreme Court of Michigan in 1889, under the title Kobogum vs. Jackson Iron Co., the personnel of the court, with the exception of Judge Campbell, had entirely changed. Judge Campbell, who wrote the second opinion of the Michigan Court merely stated that "upon this question enough was said in the opinion in 50 Mich. 578, to render full discussion unprofitable." He then referred to the general proposition quoted supra, apparently without regard to the fact that Judge Cooley and the majority of the court

had been of a contrary opinion when the case was first decided. It is submitted that the opinion of Judge Cooley is the correct one and should prevail in the case at bar.

The third case cited, Ortley vs. Ross, 78 Neb. 339, appears to have been based solely upon the Kobogum case and upon the general proposition that a marriage valid where made is valid everywhere. This without regard to the equally well established exception to the rule in the case of polygamous marriages. Moreover, the Nebraska case, while following the holding in the Michigan case was not a case of a polygamous marriage. The Nebraska case may further be distinguished upon its facts. In that case the land in controversy was allotted under the provision of a treaty entered into with the Santee Sioux proclaimed February 4, 1869, 15 Stats. 635, which made no provision for the rule of inheritance of allotments. As heretofore pointed out, the land in the case at bar was allotted under an Act of Congress of August 7, 1882, 22 Stats. 341, Sec. 6, of which provided that the land should be allotted for the sole use and benefit of the Indian, "or in case of his decease, of his heirs according to the laws of the State of Nebraska."

An analagous case where the law of the state where the land is located and not the Indian law has been applied.

An analagous case to the case at bar is the case of *Non-She-Po vs. Wa-Win-ta,* 37 Or. 213, 62 Pac. 15, 82 Am. St. 749. This was an appeal from a decree determining claims to certain real estate formerly belonging to the Oregon Tribes of Indians and allotted in severalty. As in the case at bar the allotment act expressly provided that the land should descend to the heirs of the allottee, "according to the laws of the State of Oregon." The plaintiff claimed to be the legally adopted mother and heir of an alottee. She introduced evidence that whenever an infant was abandoned by its parents the tribal law was that the person caring for it became its adopted parent and the child became the adopted child of the person so caring for it and enjoyed all the rights and privileges of a natural child. The Supreme Court of Oregon distinguishes the Indian law of adoption from that of marriage upon the ground that the adoption is not in conformity with natural rigths whereas marriage between Indians in accordance with tribal customs is in conformity with natural rights. It was held that in determining who were entitled to the allotted land as heirs of the adopted child, the Indian law or custom of adoption should not be recognized.

Adoption and *polygamy,* however, are both contrary to natural law. If the Indian law of adoption should not be recognized then also should the Indian law permitting polygamy not be recognized.

Polygamy not recognized by American courts.

The position of Judge Campbell as opposed to Judge Cooley of the Michigan Supreme Court, that polygamy is not so universal as to prevent its recognition in this country, received the following comment from the editor of the Lawyers Reports Annotated:

> "It was even held in Kobogum vs. Jackson Iron Co., 76 Mich. 498; 43 N. W. 602, that a second marriage by a person having a wife living and undivorced will be recognized, if valid by the lex loci. In that case a member of an Indian tribe living in tribal relations, took a second wife while the first wife was living and undivorced. The validity of both marriages and the legitimacy of children of each marriage, and their right to succeed to their father's property were recognized. The court in justification of its position said that while most civilized nations have discarded polygamy, and it is not lawful anywhere among English speaking nations, yet it is a recognized and valid institution among many nations, and not universally unlawful. *This decision, however, seems to be opposed to the clear weight of authority, which at the farthest recognizes only the validity of the first marriage.*" 57 L. R. A. 34.

This court in a number of cases involving Mormon marriages has used the following language concerning polygamy. *Reynolds vs. United States*, 98 U. S. 145, 165.

> "*There never has been a time in any State of the Union when polygamy has not been an offense against society, cognizable by the civil courts and punishable with more or less severity* * * *."

Mr. Justice Matthews, speaking for this court in *Murphy vs. Ramsey*, 114 U. S. 15, 45, again said:

> "Certainly no legislation can be supposed more wholesome and necessary to the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficient progress in social and political improvement."

Mr. Justice Field in *Davis vs. Beason*, 133 U. S. 333, 341, said:

> "Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. * * * Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment."

Again in *Mormon Church vs. United States*, 136 U. S. 1, 50, Mr. Justice Bradley, on behalf of the Court, used the following language:

> "The State has a perfect right to prohibit polygamy, and all other open offences against the enlightened sentiment of mankind, notwithstanding the pretense of religious conviction by which they may be advocated and practiced."

People vs. Steere, 151 N. W. 617, (Mich.):

> "Excepted from the general rule that a marriage valid according to the law of the state or country

where it is celebrated, is valid everywhere, or marriages prohibited from motives of public policy by the public law of the state or country in which they are questioned."

Earle vs. Earle, 126 N. Y. S. 317:

"The lex loci contractus governs as to the validity of the marriage, unless the marriage be odious by the common consent of nations, as where it is polygamous or incestuous by the laws of nature."

State vs. Fenn, 47 Wash. 561, 92 Pac. 417, 17 L. R. A. (N. S.) 800.

"The general doctrine that a marriage valid where contracted is valid everywhere has so often been declared by the courts and reiterated by text writers that it has become a maxim of the law. That there are exceptions to the rule as well established as the rule itself, viz: (1) Incestuous and polygamous marriages prohibited by natural law; (2) Marriages prohibited by positive law."

Bishop (on Marriage, Divorce and Separation), Vol. 1, Sec. 858, page 527:

"To bring a case within this exception something more must appear than the marriage is contrary to the general law of the state in which the question arises. It must be contrary also to the common voice of Christiandom. The familiar illustrations, perhaps the only ones of which the writer can speak with absolute assurance, are polygamous marriages and those of excessively near incestuous."

Congress has never recognized polygamy among the Indians as lawful.

The issue of marriages in accordance with Indian custom have been legitimized by various acts of Congress. In none of these acts have the issue of *polygamous* marriages been recognized. For example, February 13, 1891, Congress passed an act providing as follows:

> "That for the purpose of determining the descent of land to the heirs of any deceased Indian, under the provisions of Article 4 of said agreement with the Iowa tribe of Indians or under any law or treaty authorizing the issuance of a patent to an Indian or his heirs, according to the laws of the state or territory where such land is located, whenever any man and woman, either of whom is in whole or in part of Indian blood, shall have cohabitated together as husband and wife according to the custom and manner of Indian life, the issue of such cohabitation shall be for the purpose aforesaid, taken and deemed to be the legitimate issue of persons so living together, and every child of Indian blood, in whole or in part, otherwise illegitimate shall for such purpose be taken and deemed to be the legitimate issue of the father of such child." 26 Stat. 758.

February 28, 1891, Congress amended what is known as the General Allotment Act of 1887, adding thereto a provision similar to the one above quoted (26 Stats. 795).

These acts unquestionably had the effect of legitimizing children of *monogamous* marriages and of all other marriages consummated in accordance with

natural law. The last clause in the statute quoted has never been construed as referring to polygamous marriages but rather to monogamous marriages where not consummated in accordance with the Indian law. In re Heirs of House, 132 Wis. 212, Smith vs. Smith, 140 Wis. 599.

On the other hand by an act passed July 1, 1862, Rev. Stat. of the U. S. (2nd Ed.) Sec. 5352, provided that:

> "Every person having a husband or wife, who marries another, whether married or single, in a Territory, *or other place over which the United States have exclusive jurisdiction is guilty of bigamy.*"

This act when originally passed made specific reference to no particular territory or portion of the United States over which the United States had jurisdiction. Though it may never have been enforced as applied to the Indian tribes, they certainly came within its provisions. To say that the government has always permitted the Indian to practice polygamy does not militate against the fact that it has always been contrary to law. Marriage whether monogamous or polygamous in accordance with Indian custom was certainly not legal after the passage of the allotment acts which made the allottees citizens of the United States and of the states where the land allotted was located; yet it is generally known that both polygamous and marriages otherwise not in accordance with civilized custom and law, were consummated subsequent to that

time. The difference is between *sanctioning* such marriages as *legal* and merely permitting the Indians to continue in their barbarous and uncivilized habits.

Congress and the various legislatures seem to have recognized that the sudden imposition of the White Man's law could not, in practice, be accomplished. Accordingly Congress has passed the acts above quoted, making valid marriages consummated in a state of nature but not including polygamous marriages. The Nebraska legislature as late as 1913, passed a law similar to those passed in 18[illegible] by Congress. Laws of Nebraska, 1913, Chap. 68, Sec. 2. Though the government may have closed its eyes to some extent even to polygamy it has never expressly or impliedly recognized it as lawful among the Indians. On the contrary, it has made it a crime in all territory where it has had exclusive jurisdiction.

Conclusion as to the Rights of Sarah Hallowell Walker.

The allotment statute expressly provides that in determining who are the heirs of an allottee the "laws of the State of Nebraska" shall govern. It has been held in some instances that marriages consummated in accordance with the Indian custom would be regarded as in conformity to natural law and as valid. The statute however under which the land in controversy is held forecloses such a holding in the case at bar.

Moreover, polygamous marriages according to Indian custom, or according to the law of any time or

place, have never been recognized by our courts. Aside from the express provision of the allotment statute that the laws of the state shall conform, Sarah Hallowell Walker should not be recognized as entitled to inherit this land as an heir of Benjamin Hallowell.

In the few instances in which the precise question involved in this case has been adjudicated, notably the opinion of the Supreme Court of Michigan in the Kobogum case the decision has rested upon whit is submitted to be an erroneous theory that *polygamous* marriages come within the general rule that a marriage valid where celebrated will be considered valid at all times and places.

CHAPTER IV.

THE ALLOTMENT ACT OF 1882 CREATED AN ESTATE FOR YEARS IN TRUST FOR THE BENEFIT OF THE ALLOTTEE OR HIS HEIRS FOLLOWED BY AN ESTATE IN FEE TO THE ALLOTTEE. THE TERM "HEIRS" IN THE ALLOTMENT ACT WAS DESCRIPTO PERSONAE. THE GIFT WAS TO A CLASS DETERMINABLE AT THE END OF THE TRUST ESTATE. APPELLANT THEREFORE IS NOW THE SOLE OWNER OF THE EQUITABLE INTEREST IN THE LAND.

The Circuit Court of Appeals ruled concerning this contention of appellant:

> "Notwithstanding the *rule in Shelley's case* it is first contended that the words 'his heirs according to the laws of the State of Nebraska' as used in Section 6, 22 Stats. 341, and as also used in the preliminary patent are words of purchase and not of limitation of the estate. Appellant cites Hall vs. Russell, 101 U. S. 503; McCune vs. Essig, 199 U. S. 382, and Cutting vs. Cutting, 6 Fed. 259. By operation of the law and the preliminary patent the equitable interest in this land subject to the restrictions contained in the statute and possibly to the plenary power of Congress to enact legislation for the government of the Indians passed and the Government retained the legal title for twenty-five years. The District Court found against the appellant on this question and we are inclined to think it was correct."

As the rule in Shelley's case does not apply to an estate of less than freehold the application of that rule in the case at bar depends upon what is the nature of the estate created by the allotment act.

It must be remembered that the allotment act referred to was passed pursuant to and in performance

of a prior treaty entered into between the United States Government and the Omaha Tribe of Indians, March 6th, 1865 (14 Stat. 667). By the terms of this treaty the lands not ceded to the United States but reserved for the Omaha tribe of Indians were constituted the "Omaha Reservation," said lands to be subject to assignment in limited quantities to the individual members of the Omaha tribe. No specific provision, however, was made by the treaty for the allotment of these lands in severalty. This was provided for by the Act of 1882. An allotment, therefore, under the terms of the Act of 1882 was for good and sufficient consideration (*Chase vs. United States*, 222 Fed. 593, 597). It was a grant and conveyance of an interest in the land and not a mere voluntary promise that could be construed independent of the law of real property. The estate or estates created by the allotment act are the same as would be created by deed or will, using the same language.

Undoubtedly the allottee has an equitable estate in the land. But is that estate an inheritable one? A grant to A in trust for B for twenty-five years, and if B dies during that time for the benefit of B's heirs, thereafter to be conveyed to B and his heirs in fee, creates an estate for years followed by an estate in fee. The first estate being less than a freehold the rule in Shelley's case does not apply. The estate is not an equitable estate in fee for twenty-five years followed by the conveyance of the legal title to the

beneficiary. As an estate for years is not inheritable the term "heirs of B" can not be other than a mere description of a class determinable at the expiration of the trust estate for years, the members of which class take as purchasers.

If such is the construction of an ordinary grant it is submitted that the same construction should be put upon the allotment act of 1882 and that appellant, Simeon Hallowell, the nephew, and Margretae Clay, the sister of the allottee, succeeded to the rights of the allottee as joint tenants, and that upon the subsequent death of Margretae Clay appellant became the sole owner of the entire allotment of eighty acres.

Such has been the construction put upon statutes relating to other public lands, *Hall vs. Russel*, 101 U. S. 503, *McCune vs. Essig*, 199 U. S. 382.

This court in *United States vs. Rickert*, 188 U. S. 535, 536, said respecting an Indian allotment act:

> "The word 'patents' where it is first used in this section, was not happily chosen to express the thought which, it is clear, all parts of the section being considered, Congress intended to express. The 'patents' here referred to (although that word has various meanings) were, as the statute plainly imports, nothing more than instruments or memoranda in writing, designed to show that for a period of twenty-five years the United States would hold the land allotted in trust for the sole use and benefit of the allottee, or in case of his death, of his heirs, and subsequently, at the expiration of that period,—unless the time was extended by the president—con-

vey the fee, discharged of the trust and free of all charge or incumbrance. In other words, the United States retained the legal title, giving the Indian allottee a paper or writing improperly called a patent, showing that at a particular time in the future, unless it was extended by the president, he would be entitled to a regular patent conveying the fee."

It is submitted that an accurate definition and description of the equitable interest of the allottee and his heirs should be in accordance with the legal principles of the law of real property. Such construction of the estates created by the allotment act results in succession to the ownership of the equitable estate by survivorship.

If the estate of the allotte or his heirs during the trust period is to be regarded as an inheritable estate, in many instances the conveyance by the government at the expiration of the twenty-five year trust period will be in a large number of small parcels to the numerous heirs of the allottee. The allotments have seldom been willed, thereby keeping the ownership of the land in a small number of persons. The principles of survivorship duing the trust period therefore would accomplish the beneficial result of keeping the land intact and preventing its dissipation. This is in entire harmony with the purpose of the allotment which was to encourage the Indian to live upon and cultivate the land.

CONCLUSION.

1—There is no lack of jurisdiction of the case bar because it was pending when the act of 1910 was passed, which again placed the determination of heirship to Indian trust estates in the Secretary of the Interior. The act of 1910 repealing the act of 1894 which conferred jurisdiction of such cases upon the Federal courts should not be construed retrospectively because it affected substantial rights.

2—Defendant, Sarah Hallowell Walker, is not entitled to inherit the allotment in controversy because she is an illegimate child of a polygamous Indian marriage and does not come within the terms of the allotment act, which provides that it shall go to the heirs of the allottee "according to the laws of the state of Nebraska."

3—Defendant, Sarah Hallowell Walker, is not entitled to a share in the ownership and rents and profits from the said land regardless of the terms of the allotment act. The issue of a polygamous marriage should not be recognized as entitled to inheritance.

4—Appellant is the sole rightful owner of the allotment in controversy. Upon the death of the allottee, Jacob Hallowell, appellant, and Margretae Clay became co-tenants, and upon the death of Margretae Clay appellant succeeded to the entire ownership of the land. The term "heirs" on the allotment act is one of description and not of limitation and the heirs take as purchasers and not by inheritance.

Respectfully submitted,

HIRAM CHASE,
WILLIAM ROSS KING,
Solicitors for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

SIMEON HALLOWELL, APPELLANT,
v.
JOHN M. COMMONS, AS ACTING INDIAN agent, etc., and Sarah Hallowell Walker, appellees. } No. 135.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE APPELLEES.

[Opinion of court below reported in 210 Fed. 793.]

The principal facts of the case are sufficiently stated in the opinion of the court below (R. 17); some additional details will be given in the course of the following argument:

ARGUMENT.

The bill was properly dismissed for want of jurisdiction.

I.

The suit is not maintainable as a suit against the United States under the act of August 15, 1894, as amended.

The act of 1894 (28 Stat. 305) was amended by the act of February 6, 1901 (31 Stat. 760), to read as follows:

> That all persons who are in whole or in part of Indian blood or descent who are entitled

to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper circuit court of the United States; and said circuit courts are hereby given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (*and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant*); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands now held by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases.

SEC. 2. That the plaintiff shall cause a copy of his petition filed under the preceding section to be served upon the district attorney of the United States in the district wherein

> suit is brought, and shall mail a copy of same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within 60 days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the Government, and to file a notice of any counterclaim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises: *Provided*, That should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court.

The amendatory act added the whole of section 2 and the parenthetical clause in section 1, which we have put in italics. In other respects the act of 1894 was unchanged. The original act did not require that the United States be made a party.

Hy-yu-tse-mil-kin v. *Smith*, 194 U. S. 401.
Sloan v. *United States*, 95 Fed. 193.

But, as this court said in *McKay* v. *Kalyton*, 204 U. S. 458, 469:

> By the amendments to the act of 1894, approved February 6, 1901, ch. 217, 31 Stat. 750, it is expressly required that in suits authorized to be brought in the Circuit Courts of the United States respecting allotments of Indian lands, "the parties thereto shall be the claimant as plaintiff and the United States as party defendant." Nothing could more clearly demonstrate than does this requirement the conception of Congress that the United States continued as trustee to have an active interest in the proper disposition of allotted Indian lands and the necessity of its being made a party to controversies concerning the same for the purpose of securing a harmonious and uniform operation of the legislation of Congress on the subject.

As this act conferred a special and extraordinary jurisdiction, its requirements should be strictly complied with. The record here does not show that the precedent formalities were ever met. The bill does not profess to be founded on the special act. It does not claim its benefits or even mention it. It does not make the United States a party. The United States attorney did not assume to appear for the United States, but only for the Indian Agent Commons and the Indian woman Walker. He had no authority to appear for the United States. The suit was not regarded by the trial court as a suit invoking the special act or as a suit against the

United States. It regarded it as a suit "to quiet title to certain real estate and to recover from the respondent, Commons, agent of the Omaha Tribe of Indians, a certain sum of money received as rentals for said real estate" (R. 8). The bill was evidently drafted for the purpose of stating an ordinary case arising under the laws of the United States. It avers that the amount in dispute exceeds $2,000, exclusive of interest and costs, and that the controversy depends upon the construction of the allotment act of August 7, 1882 (R. 2). Plaintiff claims the exclusive right to lease the allotment and enjoy the rents during the remnant of the trust period, as against the defendant Walker, who claims a one-fourth interest. Commons is brought in not as a representative of the United States but as an individual who, under color of an office, in disobedience of the law and the regulations made by his superior (the Secretray of the Interior), is interfering in some way not specified with plaintiff's right to lease, and is wrongfully retaining or threatening to receive and retain a small amount of rent money to which the plaintiff is or will be entitled.

There is another consideration which deserves some attention here. This is a controversy between rival claimants over the usufruct of an allotment made to a common ancestor. The validity of the allotment is not disputed by the plaintiff; it is relied upon. Neither does it appear that there is any issue drawn between him and the Government.

Does the act of 1901 intend that all disputes concerning allotted lands may be brought into the Federal courts without regard to the amount involved, or the character of the issues, or the relations of the disputants to the Government, provided only the plaintiff be "in whole or in part of Indian blood or descent?" While the language is not clear, it does not necessarily include controversies other than such as involve claims to have lands allotted to the claimant.

In *Bond* v. *United States*, 181 Fed. 613, 616, instituted in 1907 and dismissed September 12, 1910, the court said:

> This law clearly gives the Circuit Court of the United States jurisdiction over matters growing out of the execution of the allotment act, but whether it is confined to questions concerning the right to an allotment, or is broad enough to include disputes over possession, descent, and partition of lands after the date of the allotment and before final patent, is by no means clear.

So, in *Pel-ata-yakot* v. *United States*, 188 Fed. 387, 388, the court said:

> The suit, like several others of a similar nature heretofore brought in this court, was doubtless instituted under the provisions of act February 6, 1901 (c. 217, 31 Stat., 760, amending act Aug. 15, 1894, c. 290, 28 Stat., 286). I have never been fully satisfied that by these acts Congress intended to confer upon the courts jurisdiction to determine controver-

> sies involving the question of heirship to allotted lands; but the objection has never been raised, and in a number of cases jurisdiction has been exercised. *McKay* v. *Kalyton*, 204 U. S. 458.

In *McKay* v. *Kalyton*, to be sure, it was said (p. 469) that the right to the possession of an allotment necessarily depends on an equitable title in the claimant under the legislation of Congress. This, however, was stated as a reason why disputes over possession do not fall within the jurisdiction of State courts. It was not an intimation that power to settle such questions was taken from the Secretary and vested in the Federal courts by the act of 1901.

Subdivision 24 of section 24 of the Judicial Code (approved Mar. 3, 1911, and in force Jan. 1, 1912) provides that the district court shall have jurisdiction "of all actions, suits, or proceedings involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty." An amendatory act (Dec. 21, 1911, 37 Stat., c. 5, p. 46) reenacted this provision and added the following:

> And the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him; but this provision shall not apply to any lands now or heretofore held by either of the Five Civilized

> Tribes, the Osage Nation of Indians, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases.

The code, however, does not expressly repeal, modify, or refer to the act of 1901. The last paragraph of section 298 provides that all acts and parts of acts not expressly repealed shall be deemed repealed "in so far as they are embraced within and superseded by this act," but adds "the remaining portions thereof to be and remain in force with the same effect and to the same extent as if this act had not been passed."

Whatever the effect of the code upon future cases, it is plain that by force of section 299, if for no other reason, it could have no influence upon this one.

As the acts of 1894 and 1901 operated to divest the tribal authorities, the Secretary of the Interior and the Commissioner of Indian Affairs, of authority theretofore exercised by them, and vest it in the United States courts (see *infra*), we submit that their scope should not be held to go beyond the necessary intendment of the words used. If our conception of the meaning of these acts be correct, Congress did not intend to bestow upon the courts jurisdiction to determine disputes over allotments already made and of unquestioned validity.

II.

Independently of the act of 1901, the case was not within the trial court's jurisdiction.

This is true, because the bill on its face contradicts the allegation that the amount in controversy exceeds $2,000.

The total value of the allotment is fixed at $3,200. The bill shows that the plaintiff's right to one-fourth of the allotment is conceded by both defendants. It also shows that, aside from the defendant Walker, who claims one-fourth, there are but two other possible claimants, each also for one-fourth, namely, Eileen Lawless, not sued, and Hiram Chase, the solicitor for the plaintiff, who signed the bill. Hiram Chase, however, expressly concedes that whatever right he has is subordinate to that of the plaintiff, and contingent on the plaintiff's death.

Viewed as a proceeding against Walker alone, it is plain that no judgment which the court could render would operate as an estoppel either way between the plaintiff and Lawless, who was not a party. Neither would it be possible, on the face of the case stated, to render a judgment against the plaintiff and in favor of Chase. Evidently, then, the most that was at stake was the one-fourth interest, valued at $800, to which the plaintiff and Walker both laid claim.

The pecuniary significance of the suit could not be enhanced by dragging in the defendant Commons. Commons was a mere subordinate of the Secretary

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But for this act no court would have jurisdiction of such cases whatever the amount in controversy. See p. 12.

of the Interior, subject to his command, not only because of the general provisions which place in the Secretary's hands the ultimate supervision and control of all Indian affairs (R. S. secs. 441, 463), but also because the power of the plaintiff or any other claimant to make leases of the allotment was expressly conditioned on the Secretary's approval by the statutes which created the power:

> Whenever it shall be made to appear to the Secretary of the Interior that, by reason of age, disability, or inability, any allottee of Indian lands can not personally, and with benefit to himself, occupy or improve his allotment, or any part thereof, the same may be leased upon such terms, regulations, and conditions as shall be prescribed by the Secretary for a term not exceeding five years, for farming purposes only.
>
> Act of May 31, 1900, sec. 1; 2 Comp. St. 1913, sec. 4217.
>
> All lands allotted to Indians in severalty, except allotments made to members of the Five Civilized Tribes and Osage Indians in Oklahoma, may by said allottee be leased for mining purposes for any term of years as may be deemed advisable by the Secretary of the Interior; and the Secretary of the Interior is hereby authorized to perform any and all acts and make such rules and regulations as may be necessary for the purpose of carrying the provisions of this paragraph into full force and effect.
>
> Act of March 3, 1909, 35 Stat. 783; 2 Comp. St. 1913, sec. 4220.

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See also the fourth section of the act of June 25, 1910 (36 Stat. 856; 2 Comp. St. 1913, sec. 4221), passed after this suit was begun (R. 1).

The bill avers that Commons' refusal to recognize the plaintiff's claim was contrary to the Secretary's regulations. If so, or even if not so, the plaintiff should have taken his case to the Secretary before bringing suit. His recourse to the judiciary was premature, and, upon well settled principles, the trial court was without jurisdiction to entertain his complaint.

Plested v. *Abbey*, 228 U. S. 42.

III.

Jurisdiction to determine the question of heirship was vested in the Secretary of the Interior exclusively by the act of June 25, 1910 (36 Stat. 855).

This act, entitled "An Act to provide for determining the heirs of deceased Indians, for the disposition and sale of allotments of deceased Indians, for the leasing of allotments, and for other purposes," provides:

> That when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he

> may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive.

McKay v. *Kalyton*, 204 U. S. 458, was a suit quite similar to the case at bar. An allotment had been made and a trust patent was outstanding when the allottee died. The suit was brought in a State court and resolved itself into an issue between the plaintiff, claiming the allotment as daughter of the deceased, and one of the defendants claiming as his sister, who contended that the plaintiff was the fruit of an unlawful marriage. This court, in holding that the State court was without jurisdiction, observed (p. 468):

> The *Rickert case* settled that, as the necessary result of the legislation of Congress, the United States retained such control over allotments as was essential to cause the allotted land to enure during the period in which the land was to be held in trust "for the sole use and benefit of the allottees." As observed in the *Smith case*, 194 U. S. 408, *prior to the passage of the act of 1894, "the sole authority for settling disputes concerning allotments resided in the Secretary of the Interior."* (Italics ours.) This being settled, it follows that prior to the act of Congress of 1894 controversies necessarily involving a determination of the title and incidentally of the right to the possession of Indian allotments while the same were held in trust by the United States were not primarily cognizable by any court, either State or

> Federal. It results, therefore, that the act of Congress of 1894, which delegated to the courts of the United States the power to determine such questions, can not be construed as having conferred upon the State courts the authority to pass upon Federal questions over which, prior to the act of 1894, no court had any authority.

The plain result of the act of 1910 was to transfer back to the Secretary of the Interior the exclusive power to settle disputes like the one here involved, which had been taken away from him and vested in the Federal courts by the acts of 1894 and 1901; and so it has been held, even in cases which were pending before the act of 1910 became effective.

> *Bond* v. *United States*, 181 Fed. 613;
> *Pel-ata-yakot* v. *United States*, 188 Fed. 387;
> *Parr* v. *Colfax*, 197 Fed. 302.

Those three decisions and that of the Circuit Court of Appeals in this case appear to be all the published decisions relating to the effect of the act of June 25, 1910, on the jurisdiction of the courts. The decisions cited have been followed by the United States district courts in numerous cases in Nebraska and elsewhere. There have been no decisions to the contrary.

"It is equally well settled that if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law." *Railroad Company* v. *Grant*, 98 U. S. 398, 401.

Although the statute of which these words were written operated to destroy the jurisdiction of this

court to hear a case already pending before it, it was held not to be retrospective, but prospective, in character, since it did not undo what had been done under the old law, or work destruction of any vested right. "A party to a suit has no vested right to an appeal or a writ of error from one court to another. Such a privilege once granted may be taken away, and if taken away, pending proceedings in the appellate court stop just where the rescinding act finds them, unless special provision is made to the contrary." (*Ibid.*) So, by the act of 1910, a special jurisdiction of the Federal court in which this case was pending, to inquire into and determine the question of heirship, was taken away, without legal injury to plaintiff, when the jurisdiction was restored to the Secretary of the Interior. Plaintiff was not injured by the retraction of a special privilege which did not exist before the act of 1894. He is allowed the same opportunity for the determination of his rights as would have existed if the act of 1894 and its amendment had not been passed. No reason is to be perceived why the act of 1910 should be construed as impliedly excepting any case of the character specified by its words. It evinces a definite policy to have all such matters heard and determined in the Interior Department. The mere fact that such a matter is already pending in the Federal court affords no reason for implying an exception which Congress did not see fit to incorporate into the statute. Furthermore, it is to be noted that the act of 1910 was in force long before this case was disposed of by the trial court. In fact, it would seem

from the record that the suit was in effect reinstituted after the act was in force. On November 1, 1910, an order was entered dismissing the bill (R. 10). This was in effect a final decree. In October, 1911, presumably after the expiration of the term in which the decree was entered, counsel stipulated that it might be set aside and the bill reinstated with leave to the complainant to amend it. An order was entered in accordance with this stipulation the same month. Plaintiff then amended his original bill by interlineation and afterwards, without leave of court, filed a new and amended bill. On June 25, 1912, the new bill was stricken out on motion and the original bill dismissed on demurrer.

OBSERVATIONS ON THE MERITS.

In view of the absence of jurisdiction, extended comment on the merits is unnecessary. The rights of all the heirs should be determined by the Secretary of the Interior. Plaintiffs' contention that upon the death of the allottee the estate was held in trust for the plaintiff and Megretae Clay as joint tenants and that upon her death he became the sole beneficiary by right of survivorship we frankly do not understand. The question whether the prospective heirs of an allottee have an interest in the estate *before* his death is not involved in this case but may be in others, so we abstain from discussing it. But, upon his death, before the trust expires, the heirs are at once to be defined, according to the

State law, upon the theory that an equitable estate in fee has devolved upon them. Section 6 of the Omaha allotment act provides that the lands shall be held in trust for 25 years for the sole use of the allottee or, in case of his decease, of his heirs, under the State laws, and that, when the trust period expires, the absolute fee shall be conveyed to him, "or his heirs *as aforesaid.*" This can only mean that the heirs, when they are to be defined at his death, whether he dies before or after the trust period ends, shall be those persons whom the State law selects for the inheritance of a fee estate—a legal fee or an equitable fee bound to become absolute by mere lapse of time. There is no assignable reason for applying the theory of survivorship between those persons.

All the authorities we have found on the subject adhere to this view.

Porter v. *Parker*, 68 Neb. 338.
McCauley v. *Tyndall*, id. 685.
Reese v. *Harlan*, 77 Neb. 485.
Parr v. *United States*, 153 Fed. 462.
Wheeler v. *Petite*, id. 471.
Beam v. *United States*, id. 474.

The defendant Walker's right was the same as the plaintiff's notwithstanding the polygamous marriage. It is stipulated that the marriage was good under the tribal custom, and that it occurred and that Walker was born before the allotment act was passed (R. 10).

It is well known that the practice of polygamy was prevalent in many of the Indian tribes; it was common among the Omahas.

Otley v. *Ross*, 78 Neb. 339, 341.

The General Government, treating the tribes as independent communities and *quasi* sovereignties, allowed them to be governed by their own laws and practices in this regard, and the validity of plural marriages was judged accordingly. See 191 Fed. 516; 2 Fed. 417; 42 Minn. 361; 78 Mich. 498; 175 U. S. 1, 29. Until the enactment of the allotment act and its acceptance by the Omaha Indians, they constituted a separate people with full power to regulate their own internal and social relations. It will not do to attribute to Congress a purpose to disinherit the children born in wedlock which was both moral and lawful in the eyes of the Indians and not discountenanced, but actually tolerated, by the Government itself. The case of *Otley* v. *Ross, supra,* as observed by the learned court below, is the best possible evidence that Indian children born in these circumstances are legitimate children in the eye of the law of Nebraska.

CONCLUSION.

It is respectfully submitted that the judgment of the court below should be affirmed.

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Solicitor for the Appellees.

DECEMBER, 1915.

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